IN THE

Supreme Court of the United States

October Term, 1968

No. 488

MRS. DORIS DANIEL and MRS. ROSALYN KYLES,

Petitioners,

—v.—

EUELL PAUL, JR., Individually and as Owner, Operator or Manager of Lake Nixon Club,

Respondent.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

BRIEF FOR PETITIONERS

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Citations to Opinions Below

The February 1, 1967 memorandum opinion of the District Court, reprinted in the Appendix at pp. 47-62, is reported at 263 F. Supp. 412. The May 3, 1968 opinion of the United States Court of Appeals for the Eighth Circuit, reprinted in the Appendix at pp. 64-82, is reported at 395 F.2d 118. The dissenting opinion of Judge Heaney, reprinted in the Appendix at pp. 82-90, is reported at 395 F.2d 127.

Jurisdiction

The judgment of the United States Court of Appeals for the Eighth Circuit was rendered May 3, 1968. A petition for a rehearing *en banc* was denied on June 10, 1968. A petition for writ of certiorari was filed September 7, 1968 and granted December 9, 1968 (A. 105). The jurisdiction of this Court is invoked pursuant to 28 U. S. C. §1254(1).

Questions Presented

1. Lake Nixon Club is a privately owned and operated recreational area open to the white public in general. Lake Nixon has facilities for swimming, boating, picnicking, sunbathing, and miniature golf. On the premises is a snack bar principally engaged in selling food for consumption on the premises which offers to serve interstate travelers and which serves food a substantial portion of which has moved in commerce.

a) Is the snack bar a covered establishment within the contemplation of Title II of the Civil Rights Act of 1964, and if *so, does* this bring the entire recreational area within the coverage of Title II?

b) Is the Lake Nixon Club a place of entertainment within the scope of Title II?

2. Petitioners are denied admission to Lake Nixon Club solely because they are Negroes. Have petitioners been denied the same right to make and enforce contracts and have an interest in property, as is enjoyed by white citizens, in violation of the Thirteenth Amendment and an Act of Congress, 42 U. S. C. §§1981, 1982?

Constitutional and Statutory Provisions Involved

This case involves the Commerce Clause, Art. 1, §8, cl. 3, and the Thirteenth and Fourteenth Amendments of the Constitution of the United States.

This case also involves the following United States statutes:

42 U. S. C. §1981:

All persons within the jurisdiction of the United States shall have the same right in every State and Territory to make and enforce contracts, to sue, be parties, give evidence, and to the full and equal benefit of all laws and proceedings for the security of persons and property as is enjoyed by white citizens, and shall be subject to like punishment, pains, penalties, taxes, licenses, and exactions of every kind, and to no other.

42 U. S. C. §1982:

All citizens of the United States shall have the same right, in every State and Territory, as is enjoyed by white citizens thereof to inherit, purchase, lease, sell, hold, and convey real and personal property.

42 U. S. C. §2000a(b):

Each of the following establishments which serves the public is a place of public accommodation within the meaning of this subchapter if its operations affect commerce, or if discrimination or segregation by it is supported by State action:

. . .

(2) any restaurant, cafeteria, lunchroom, lunch counter, soda fountain, or other facility principally engaged in sell-

ing food for consumption on the premises, including, but not limited to, any such facility located on the premises of any retail establishment; or any gasoline station;

(3) any motion picture house, theater, concert hall, sports arena, stadium or other place of exhibition or entertainment; and

(4) any establishment (A)(i) which is physically located within the premises of any establishment otherwise covered by this subsection, or (ii) within the premises of which is physically located any such covered establishment, and (B) which holds itself out as serving patrons of such covered establishment.

42 U. S. C. §2000a(c):

The operations of an establishment affect commerce within the meaning of this subchapter if . . . (2) in the case of an establishment described in paragraph (2) of subsection (b) of this section, it serves or offers to serve interstate travelers or a substantial portion of the food which it serves, or gasoline or other products which it sells, has moved in commerce; (3) in the case of an establishment described in paragraph (3) of subsection (b) of this section, it customarily presents, films, performances, athletic teams, exhibitions, or other sources of entertainment which move in commerce; and (4) in the case of an establishment described in paragraph (4) of subsection (b) of this section, it is physically located within the premises of, or there is physically located within its premises, an establishment the operations of which affect commerce within the meaning of this subsection. For purposes of this section, "commerce" means travel, trade, traffic, commerce, transportation, or communication among the several States, or between the District of Columbia and any

State, or between any foreign country or any territory or possession and any State or the District of Columbia, or between points in the same State but through any other State or the District of Columbia or a foreign country.

Statement

On July 13, 1966, petitioners, Mrs. Doris Daniel and Mrs. Rosalyn Kyles, Negro citizens of the City of Little Rock, Pulaski County, Arkansas, instituted a class action in the United States District Court for the Eastern District of Arkansas against Euell Paul, Jr., individually and as owner of Lake Nixon Club, Pulaski County, Arkansas (A. 2-3). The petitioners claimed that the Lake Nixon Club was depriving them, and Negro citizens similarly situated, of rights, privileges and immunities secured by (a) the Fourteenth Amendment to the Constitution of the United States; (b) the Commerce Clause of the Constitution; (c) Title II of the Civil Rights Act of 1964 (42 U. S. C. §2000a), providing for injunctive relief against discrimination in places of public accommodation; and (d) 42 U. S. C. §1981, providing for the equal rights of citizens and all persons within the jurisdiction of the United States (A. 2). The complaint alleged the Lake Nixon Club pursues a policy of racial discrimination in the operation of its facilities, services and accommodations; petitioners prayed for injunctive relief (A. 4-5).

On August 3, 1966, Mr. Euell Paul, Jr., answered the complaint (A. 6-7). At trial, Mrs. Paul was made a party defendant without objection (263 F. Supp. at 414). After trial without a jury, the district court, on February 1, 1967, held that the Lake Nixon Club is not a place of public accommodation within the contemplation of the Civil Rights Act and that its operations do not affect com-

merce, and dismissed the complaint with prejudice (263 F. Supp. at 420). The petitioners filed notice of appeal to the Court of Appeals for the Eighth Circuit on March 2, 1967 (A. 63).

The United States Court of Appeals for the Eighth Circuit affirmed the judgment of the district court on May 3, 1968, Judge Heaney dissenting, 395 F.2d 118, 127. On June 10, 1968, petitioners' petition for rehearing was denied.

Lake Nixon Club is a recreational area comprising 232 acres (A. 41) and located about 12 miles west of Little Rock, Arkansas (Appellee's Brief in the Court of Appeals, 1). There is a State highway located 5 miles north of Lake Nixon and a U.S. highway located 5 miles to the south (Appellee's Brief in the Court of Appeals, 2).

During each season, approximately 100,000 people avail themselves of Lake Nixon's swimming, picnicking, boating, sun-bathing, and miniature golf (263 F. Supp. at 416).

At Lake Nixon there is a snack bar which sells hamburgers, hot dogs, milk and sodas for consumption on the premises (263 F. Supp. at 416). The snack bar is operated by Mrs. Paul's sister under an oral agreement whereby the parties share the profits from the snack bar (A. 32). In 1966 the gross receipts from food sales accounted for almost 23% of the total gross receipts ($10,468.95 out of a total of $46,326.00) (A. 13, 63).

The equipment of Lake Nixon includes two juke boxes manufactured out of Arkansas (263 F. Supp. at 417); 15 aluminum paddle boats leased from an Oklahoma company, and a surfboard or yak purchased from the same company (A. 28-29). The rental cost of the paddle boats is based on a percentage of the profits realized from their rental to patrons of Lake Nixon (A. 28).

Lake Nixon Club was advertised in the following media: (a) once in 1966 in *Little Rock Today,* a monthly publication distributed free of charge by Little Rock's leading hotels, chambers of commerce, motels and restaurants to their guests, newcomers and tourists; (b) once in 1966 in the Little Rock Air Force Base publication; (c) and three days each week from May through September, 1966, over radio station KALO (A. 12, 96; 263 F. Supp. at 417-418). A typical radio announcement stated:

> "Attention all members of Lake Nixon. In answer to your requests, Mr. Paul is happy to announce the Saturday night dances will be continued . . . Lake Nixon continues their policy of offering you year-round entertainment. The Villagers play for the big dance Saturday night and, of course, there's the jam session Sunday afternoon . . . also swimming, boating, and miniature golf . . ." 395 F.2d at 130, n. 10 (dissenting opinion).

On July 10, 1966, the petitioners sought admission to Lake Nixon (A. 37-38). The district court found they were refused admission because they are Negroes (263 F. Supp. at 418) and concluded Lake Nixon Club is not a private club within the contemplation of the 1964 Civil Rights Act, but is a facility open to the white public in general (263 F. Supp. at 418).

Summary of Argument

Lake Nixon Club is a 232 acre site for public amusement and recreation, located just outside of Little Rock, Arkansas, open to the white public in general but excluding blacks. In addition to such activities as swimming, boating, picnicking and miniature golf, Lake Nixon Club contains a snack bar selling food for consumption on the prem-

ises. Lake Nixon advertises its entertainment on radio and in magazines directed to tourists. Because the snack bar, which serves Lake Nixon's patrons, offers to serve interstate travelers as members of the general public and serves or sells food and other products, which have moved in commerce, the whole of Lake Nixon is subject to Title II of the 1964 Civil Rights Act.

Lake Nixon Club is also a place of entertainment affecting commerce within the scope of §201(b)(3) and (c)(3) because its patrons are entertained by the activities of others who enjoy the establishment's recreational facilities. The legislative history of Title II supports the view that Congress sought to encompass places of public amusement like recreational areas within the statute. Furthermore, Lake Nixon is subject to §201(c)(3) because it purchases and leases recreational equipment from out-of-state concerns and makes available to its patrons facilities for entertainment manufactured outside of Arkansas.

Lake Nixon is also barred from discriminating against blacks by the equal contractual and property rights guarantees of 42 U. S. C. §§1981 and 1982. These statutes, derived from the 1866 Civil Rights Act, cover the right of Negroes not to be denied the right to contract and to use property of a place of public amusement. Sections 1981 and 1982 stand independent of the provisions of Title II of the 1964 Civil Rights Act. The legislative history of §§1981 and 1982 supports the view that these statutes were designed to eradicate racial discrimination in places of public accommodation.

ARGUMENT

I.

Lake Nixon Club, a Place of Public Accommodation, Which Offers to Serve Interstate Travelers and Provides Food, Facilities for Entertainment, and Other Products Which Have Moved in Commerce, Is Barred From Excluding Petitioners by Title II of the 1964 Civil Rights Act.

For reasons stated in greater detail below, Lake Nixon Club is a place of public accommodation within the coverage of Title II of the 1964 Civil Rights Act on both of the following grounds:

1. A snack bar on the premises serves a substantial amount of food that has moved in commerce and sells or offers to sell food to all patrons of Lake Nixon, including interstate travelers. Section 201(b)(4) and (c)(4).

2. Lake Nixon is a place of entertainment customarily presenting sources of entertainment which move in commerce. Section 201(b)(3) and (c)(3).

A. *Title II of the 1964 Civil Rights Act Applies to the Whole of Lake Nixon Because of Its Lunch Counter's Operations.*

It is not disputed that Lake Nixon's snack bar is principally engaged in selling food for consumption on the premises of Lake Nixon,[1] making the snack bar subject to

[1] The district court erroneously concluded that the test under §201(b)(2) was whether the "establishment" was "'principally engaged' in the sale of food for consumption on the premises"; having concluded that Lake Nixon Club was not principally engaged in selling food, the district court held that §201(b)(2) did not apply. 263 F. Supp. at 419. The district court's holding misconstrues the language and meaning of §201(b)(2), that an estab-

§201(b)(2). Because the snack bar offers to serve interstate travelers and serves or sells food and other products which have moved in commerce, the whole of Lake Nixon is subject to §201(c)(2) and (c)(4), and thus barred from excluding patrons, as here, on racial grounds.

Lake Nixon Club offers to serve interstate travelers by the mere fact that it is open, as the district court found, to the white public in general. 263 F. Supp. at 418. Section 201(c)(2) covers an establishment if "... it serves or offers to serve interstate travelers ..." It is plain from the language that there need be no showing that interstate travellers were actually served; an offer is sufficient. *Wooten* v. *Moore*, 400 F.2d 239, 242 (4th Cir. 1968).

The district court misconceived the issue by finding no evidence that Lake Nixon "ever tried to attract interstate travelers *as such*." 263 F. Supp. at 418 (emphasis added). The Eighth Circuit compounded the error by holding, "There is no evidence that any interstate traveler ever patronized this facility, or that it offered to serve interstate travelers ..." 395 F.2d at 127. Where an establishment like Lake Nixon advertises its facilities on radio and in magazines for tourists and servicemen, charging only a token 25¢ membership fee, what is important is whether Lake Nixon *prohibits* interstate travelers from using its facilities.

Furthermore the district court, sitting near Lake Nixon in Little Rock, concluded "it is probably true that some out-of-state people" have visited Lake Nixon. 263 F. Supp. at 418. Under these circumstances, Lake Nixon

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lishment like a restaurant or a lunch counter is covered if such *eating facility* is principally engaged in selling food for consumption on its premises or on the premises, for example, of a retail establishment where the eating facility is located. *Fazzio Real Estate Co.* v. *Adams*, 396 F.2d 146, 149 (5th Cir. 1968).

offers to serve interstate travelers within the meaning of §201(c)(2). *Hamm* v. *Rock Hill*, 379 U.S. 306 (1964); *Miller* v. *Amusement Enterprises Inc.*, 394 F.2d 342 (5th Cir. *en banc*, 1968).

In the district court the owners of Lake Nixon suggested it was a private club within the exemption of §201(e). But every judge who has considered this case has found that Lake Nixon is open to members of the white race in general for profit and thus not a private club. 263 F. Supp. at 418; 395 F.2d at 123, 130.[2]

Lake Nixon is also subject to 201(c)(2) because a substantial portion of the food and other products sold at the snack bar have moved in commerce. "Substantial" means more than minimal. 395 F.2d at 124; *Gregory* v. *Meyer*, 376 F.2d 509, 511 n. 1 (5th Cir. 1967).

The only food served at the snack bar consists of hamburgers, hot dogs, soft drinks, and milk, 263 F. Supp. at 416. The district court took judicial notice that the principal ingredients of bread are produced outside of Arkansas and that some ingredients of soft drinks probably originated outside of Arkansas. 263 F. Supp. at 418. The Eighth Circuit asserted, however, that bread ingredients would not constitute a substantial portion of the food served and that the milk used was obtained in Arkansas. 395 F.2d at 124. But to ascribe to "substantial" any meaning other than "more than minimal" forces the Court and

[2] Lake Nixon contains none of the indicia of a private club such as a membership committee, self-government, ownership of assets by the membership, and social as opposed to profit-making objectives. Mr. and Mrs. Paul own Lake Nixon; they exercise their own judgment in admitting or excluding "members"; there is no list of "members" and no address required on membership cards; radio and magazine notices are given to "members" of Lake Nixon's entertainment; a nominal 25¢ fee is charged for "membership"; the Pauls operated Lake Nixon for profit. 263 F. Supp. at 416-18.

counsel to reflect on obvious facts such as hamburgers and hot dogs are served in a bun or other piece of bread. Since the snack bar sold many hamburgers and soft drinks (A. 31, 34), three of the four food items sold at the snack bar, including the two major products, contained ingredients originating outside of Arkansas. That 75% of the types of foodstuffs sold contain out-of-state ingredients would seem substantial by any reasonable test. *Katzenbach* v. *McClung*, 379 U.S. 294, 296-97 (1964) (46% is substantial); *Codogan* v. *Fox*, 266 F. Supp. 866 (M.D. Fla. 1967) (23-30% is substantial). Having established this, it seems that a more common sense approach, i.e., telling at a glance whether a more than *de minimis* test has been satisfied, is all that should be required in the interest of the policy of the law and judicial economy.

Because the snack bar is physically located within the premises of Lake Nixon and holds itself out as serving patrons of Lake Nixon, all of its facilities and privileges comprise a place of public accommodation within §201 (b)(4) and (c)(4).

Both the district court and the court of appeals held that, because the gross income from food sales constitutes a relatively small percentage of the total gross income (23%) and the sale of food is merely an adjunct to the Pauls' principal purpose of providing recreational facilities, Lake Nixon is a single unit operation and not covered by §201 (b)(4). Apparently the Eighth Circuit requires for coverage under Title II at least two establishments under separate ownership: See 395 F.2d at 123. This holding is in conflict with the decision of every other court which has considered this subsection.

In *Fazzio Real Estate Co.* v. *Adams*, 396 F.2d 146 (5th Cir. 1968), the court held that where the operators of a bowling alley also operated a snack bar for the patrons

of the bowling alley, the entire establishment was covered by this subsection. Income from the sale of food and beer in *Fazzio* represented 23% of the total gross income; income from the sale of food alone represented 8 to 11% of the total gross income. The court held that even 8 to 11% could not be considered insignificant and explicitly rejected the substantial business purpose test of the Eighth Circuit, *compare* 396 F.2d at 150 *with* 395 F.2d at 123. The Fifth Circuit stated, 396 F.2d at 149:

> The Act contemplates that the term "establishment" refers to any separately identifiable business operation without regard to whether that operation is carried on in conjunction with other service or retail sales operations and without regard to questions concerning ownership, management or control of such operations.[3]

Even under its own rule that Title II covers only separately managed but physically connected establishments, the Eighth Circuit erred in failing to find the snack bar's operations made Lake Nixon a public accommodation within the coverage of Title II. The evidence is that the snack bar is a separate enterprise managed by Mrs. Paul's sister pursuant to an oral contract whereby the Pauls and Mrs. Paul's sister share the profits from food sales.

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[3] In *Evans* v. *Laurel Links, Inc.*, 261 F. Supp. 474 (E.D. Va. 1966), the court held an entire golf course within the coverage of Title II, because the operators of the golf course maintained a lunch counter for the patrons of the course. Income from food sales constituted 15% of the total gross income of the golf course. See also *Hamm* v. *Rock Hill*, 379 U.S. 306 (1964); *Scott* v. *Young*, 12 Race Rel. L. Rep. 428 (E.D. Va. 1966) (recreational area with snack bar). The legislative history supports the majority rule. The Report of the House Judiciary Committee states that subsection (b)(4) "would include, for example, retail stores which contain public lunch counters otherwise covered by Title II". H. R. Rep. No. 914, 88th Cong., 1st Sess. 20 (1963).

B. *Lake Nixon Is a Place of Entertainment As Defined by Title II of the 1964 Civil Rights Act.*

Lake Nixon also is a place of entertainment within the contemplation of Title II and we submit that this Court should so hold. The snack bar might be eliminated for the purpose of removing Lake Nixon from Title II coverage and then further litigation would be necessary to determine whether it is a place of entertainment. This possibility is not fanciful: in a companion case involving a similar recreational area, all sales of food were discontinued after petitioners instituted an action under Title II, 263 F. Supp. at 417. In addition, the conflict between the Eighth Circuit's construction of "place of entertainment" and that of the Fifth Circuit in *Miller* v. *Amusement Enterprises, Inc.*, 394 F.2d 342 (5th Cir. *en banc*, 1968), should be resolved by this Court.

The Eighth Circuit held Lake Nixon was not a "place of entertainment", because the Court found a total lack of evidence that its activities or entertainment moved in commerce, 395 F.2d at 125. The district court, defining "place of entertainment" to mean an establishment where the patrons are spectators or listeners and their physical participation is non-existent or minimal, held that Lake Nixon is not within this definition (263 F. Supp. at 419).

In *Miller* v. *Amusement Enterprises, Inc., supra*, the Court of Appeals for the Fifth Circuit, sitting *en banc*, overruled the prior decision of a three-judge panel (reported at 391 F.2d 86), and held that Fun Fair amusement park in Baton Rouge, La., is a place of entertainment within the coverage of Title II. Noting that it was not necessary to its decision, the Court held that even under a narrow construction of "place of entertainment" to include only places which present exhibitions for spectators, Fun

Fair is a covered establishment because "many of the people who assemble at the park come there to be entertained by watching others, particularly their own children, participate in the activities available", 394 F.2d at 348. Swimming, boating, picnicking, sun-bathing and dancing at Lake Nixon are certainly as much, if not more, spectator activities as ice-skating and "kiddie rides" at Fun Fair, see 394 F.2d at 348.

The overriding purpose of Title II was to eliminate discrimination in those facilities which were the focal point of civil rights demonstrations. *Hearings on H. R. 7152 Before the House Comm. on the Judiciary,* 88th Cong., 1st Sess., ser. 4, pt. 4, at 2655 (1963) (Testimony of Attorney Gen'l Kennedy). President Kennedy clearly intended that recreational areas and other places of amusement be covered. *Hearings on Miscellaneous Proposals Regarding Civil Rights Before Subcomm. No. 5 of the House Comm. on the Judiciary,* 88th Cong., 1st Sess., ser. 4, pt. 4, at 1448-1449, 2655 (1963). Facilities which were the focal point of demonstrations were consistently identified in both the Senate and House hearings as lodging houses, eating places, and places of amusement or recreation. 110 Cong. Rec. 7383 (1964) (Remarks of Sen. Young). While the Senate was debating the Act, there were demonstrations at the Gwynn Oak Amusement Park in Maryland; Senator Humphrey stated that this was proof of the need for this Act. 109 Cong. Rec. 12276 (1963).

Under either a narrow or a liberal construction of "place of entertainment", coverage depends on whether Lake Nixon customarily presents sources of entertainment which move in commerce. The Eighth Circuit could not discern any evidence that any source of entertainment customarily presented by Lake Nixon moved in interstate commerce, 395 F.2d at 125.

In fact, "sources of entertainment" were intended to include equipment. In a discussion of §201(c)(3), Senator Magnuson, floor manager of Title II, pointed out that "establishments which receive *supplies, equipment* or goods through the channels of interstate commerce . . . narrow their potential markets by artificially restricting their patrons to non-Negroes, the volume of sales and therefore, the volume of interstate purchases will be less," 110 Cong. Rec. 7402 (1964) (emphasis added). In the discussion of the demonstration at the Gwynn Oak Amusement Park, Senator Humphrey believed that the park would be covered by the Act in part because he was "confident that merchandise and facilities used in the park were transported across State lines," 109 Cong. Rec. 12276 (1963).

Lake Nixon purchases and leases its boats from an Oklahoma company. The Pauls rent two juke boxes which were manufactured outside Arkansas and which play records manufactured outside Arkansas. In view of these facts the Eighth Circuit is in direct conflict with Fifth Circuit's decision in *Miller*. The *Miller* Court relied in part on the fact that 10 of the 11 "kiddie rides" at the park were purchased from out of state, 394 F.2d at 351, to find an effect on commerce. But the Court also concluded that even under a narrow construction of the Act, since Fun Fair is located on a major highway and does not geographically restrict its advertising, the logical conclusion is that a number of the patrons, whose activities may entertain, have moved in commerce, 394 F.2d at 349. The same circumstances which make it reasonable to assume that some interstate travelers will accept Lake Nixon's offer to serve the general public make it reasonable to assume that some of Lake Nixon's patrons have moved in commerce.

The Eighth and Fifth Circuits are also in conflict as to the meaning of "move in commerce". The district court

found that Lake Nixon's operations do not affect commerce on the ground that, although the boats, juke boxes and records have moved in commerce, they do not now move, 263 F. Supp. at 420. The court concluded that because the phrase, "has moved", appears in the section concerning eating facilities, Congress must have intended to limit the section concerning places of entertainment to sources which "move", and therefore sources of entertainment which have but no longer move, are not covered, 263 F. Supp. at 420. The Fifth Circuit, on the other hand, expressly concluded in *Miller* that Congressional use of the present tense of "move" was not intended to exclude other tenses, 394 F.2d at 351-52.

The legislative history supports the conclusion of the Fifth Circuit. The Report of the Senate Committee on Commerce refers within a single paragraph to "sources of entertainment which move in interstate commerce" and "entertainment that has moved in interstate commerce", as within the contemplation of §201(c)(3). *S. Rep. No. 872 on S. 1732*, 88th Cong., 2nd Sess. 3 (1964). See also 110 Cong. Rec. 6557 (1964) (remarks of Sen. Kuchel). In addition, a proposal to amend §201(c)(3) to read "sources of entertainment which move in commerce and have not come to rest within a state" was rejected. 110 Cong. Rec. 13915, 13921 (1964). The subsequent debate indicates that Congress intended the bill to reach businesses which individually had a minimal or insignificant impact on interstate commerce. 110 Cong. Rec. 13924 (1964).

II.

The Equal Right to Make and Enforce Contracts and to Have an Interest in Property, Guaranteed by 42 U.S.C. §§1981 and 1982, Includes the Right of Negroes to Have Access to a Place of Public Amusement.

The first sentence of the Civil Rights Act of 1866, enacted pursuant to the Thirteenth Amendment, provided, *inter alia*, for citizens to have the same right to make and enforce contracts and have an interest in property as is enjoyed by white citizens. These rights are now embodied in 42 U. S. C. §§1981 and 1982. Negro petitioners have been denied these rights because the Pauls barred them from becoming 25¢ "members" of Lake Nixon solely on racial grounds. The Lake Nixon membership fee is in effect a contract, like the purchase of a ticket, entitling one to use, for a time, the real and personal property on Lake Nixon's 232 acres. See *Griffin* v. *Southland Racing Corp.*, 236 Ark. 872, 370 S.W.2d 429 (1963); *Vallee* v. *Stengel*, 176 F.2d 697 (3rd Cir. 1949). Denial of these contractual and property rights on racial grounds violates rights secured by the 1866 Civil Rights Act. See *Jones* v. *Mayer Co.*, 392 U.S. 409, 426, 436, 439-41 (1968). As this Court held just last term, "At the very least, the freedom that Congress is empowered to secure under the Thirteenth Amendment includes the *freedom to buy whatever a white man can buy . . .*" *Jones* v. *Mayer Co.*, *supra*, 392 U.S. at 443 (emphasis added). Neither of the courts below considered the applicability of *Jones* since it was decided subsequent to the Eighth Circuit's denial of rehearing.

For reasons essentially similar to those holding §1982 independent of the Civil Rights Act of 1968, 42 U. S. C. §§3601-3631—the principal reasons being differences in coverage between the two statutes and no Congressional pur-

pose to limit §1982—petitioners submit that §§1981 and 1982 provide rights independent of Title II of the 1964 Civil Rights Act, 42 U. S. C. §2000a.[4] See *Jones* v. *Mayer Co., supra,* 392 U.S. at 413-17. Where racial discrimination between blacks and whites is alleged, the great advantage of applying the sweeping and unambiguous language of §§1981, 1982 is that no complex statutory tests for coverage need be applied as in the case of Title II of the 1964 Civil Rights Act.[5]

In this case a threshold question on the applicability of §§1981 and 1982 is whether these statutes are properly before the Court. Section 1981, guaranteeing equal contractual rights, was specifically pleaded in the complaint (A. 2, 5), and thus its applicability is properly to be determined. Section 1982 was not pleaded below but this does not bar petitioners from relying on it here because this Court has made clear that the "mere failure" to raise a constitutional or statutory question "prior to the announcement of a decision which might support it cannot prevent a litigant from later invoking such a ground" *Curtis Publishing Co.* v. *Butts,* 388 U.S. 130, 142-143 (1967); *Thorpe* v. *Housing Authority,* 37 U.S.L.W. 4068, 4072 and

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[4] Among other points of difference between §§1981, 1982 and Title II are these: (a) Sections 1981, 1982 contain no exceptions whereas Title II covers only places of public accommodation affecting commerce as defined; (b) Title II prohibits discrimination based on religion and national origin whereas §§1981, 1982 prohibit only treatment different from *white citizens;* (c) Title II makes no distinction between citizens and persons—all are entitled to be free from discrimination, whereas §1982 guarantees to *citizens* property rights equal to white citizens. No intent to modify §§1981 or 1982 could be found in the legislative history of Title II.

[5] Much litigation has concerned simply Title II's requirement of "affecting commerce." See *e.g., Fazzio Real Estate Co.* v. *Adams,* 396 F.2d 146 (5th Cir. 1968); *Newman* v. *Piggie Park Enterprises, Inc.,* 256 F. Supp. 941 (D.S.C. 1966), *rev'd,* 377 F.2d 433 (4th Cir. 1967), *mod. and aff'd on oth. gds.,* 390 U.S. 400 (1968).

accompanying notes (U.S. Jan. 13, 1969). Furthermore, this precise issue was before this Court last term in *Sullivan* v. *Little Hunting Park*, 392 U.S. 657 (1968) where this Court vacated the judgment of the Virginia Supreme Court of Appeals and remanded the case for further consideration in light of *Jones* v. *Mayer Co.*, *supra*, even though the *Sullivan* petitioners did not rely on §1982 in the Virginia courts.

This case, involving as it does the contractual and property rights of blacks to use Lake Nixon Club is, therefore, controlled by the language of §§1981 and 1982 requiring equal rights. Any intimation to the contrary in the *Civil Rights Cases*, 109 U.S. 3, 16-18 (1883) has been superseded by the approval on Thirteenth Amendment grounds of the 1866 Act in *Jones*, 392 U.S. at 426, 436, 439-41. This Court's holding in *Jones* and the legislative history of the 1866 Act, from which §§1981 and 1982 are derived,[6] demonstrate a

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[6] Much of the legislative history of the 1866 Civil Rights Act which this Court found persuasive in *Jones* is applicable here to show that the Act was intended to make blacks the *practical* equal of whites. 392 U.S. at 420-40 and accompanying notes. The sponsor of the 1866 Act, Senator Trumbull, repeatedly affirmed the Act's intention to give blacks the rights to go or come at pleasure and to buy and sell without discrimination. Cong. Globe, 39th Cong., 1st Sess. 43, 322, 475, 599. The opponents of the Act and its companion bill, the Freemen's Bureau Bill, pointed out the Act would permit commingling of whites and blacks in hotels, theaters and public conveyances. Cong. Globe, 39th Cong., 1st Sess. at 541 (remarks of Rep. Dawson); *id.* at Appendix 183, 936 (remarks of Sen. Davis); *id.* at Appendix 69 (remarks of Rep. Rousseau). No one disputed this view. Furthermore, in the early years following the Act's passage, the common view of its friends and enemies that it applied to public accommodations and conveyances was generally accepted by various courts. H. Flack, *The Adoption of Fourteenth Amendment* 46-47, 52-54 (1908); *Coger* v. *The North West Union Packet Co.*, 37 Iowa 145, 153-54 (1873). Cf. "That the [1866 Civil Rights] bill would indeed have so sweeping an effect [in breaking down all discrimination between whites and blacks] was seen as its great virtue by its friends and as its great danger by its enemies but was disputed by none." *Jones* v. *Mayer Co.*, *supra*, 392 U.S. at 433 (footnotes omitted).

Congressional purpose to outlaw racial discrimination where, as here, access to public accommodations concerns rights of contract and property.

CONCLUSION

For the foregoing reasons the judgment below should be reversed or, in the alternative, reversed and remanded for reconsideration in light of *Jones* v. *Mayer Co.*, 392 U.S. 409 (1968).

Respectfully submitted,

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